TC02724

Appeal number: TC/2012/03755

VAT – application for permission to appeal out of time – Data Select and O'Flaherty considered – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHISHOLM BOOKMAKERS LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE KEVIN POOLE
PHILIP GILLETT FCA

Sitting in public in 45 Bedford Square, London on 30 November 2012

Geoffrey Tack of DLA Piper UK LLP, solicitors for the Appellant

Lynne Ratnett, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns an application for permission to appeal out of time.

2. Following the hearing on 30 November 2012, the Tribunal invited further written submissions in the light of the decision of the Upper Tribunal in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC).

3. Following the receipt of such submissions, the Tribunal issued a summary decision on 4 February 2013 refusing the Appellant's application.

4. The Appellant subsequently requested full findings of fact and reasons for the Tribunal's decision.

The facts

5. The Appellant wished to claim a repayment of VAT in respect of what it considered to be overpaid output VAT on its receipts from certain gaming machines over the period 1 April 2003 to 5 December 2005. On 23 August 2006 it submitted a detailed claim to HMRC. Receiving no response, it sent a follow up letter on 15 January 2007.

6. On 30 January 2007, HMRC replied, stating that in their view the ECJ ruling in *Finanzamt Gladbeck v Edith Linneweber* (ECJ Case C-453/02) [2005] All ER (D) 254 meant that the Appellant's claim was incorrect and they therefore refused it. They said that the Appellant had the right to appeal this decision to the predecessor tribunal to this Tribunal.

7. On 5 February 2007 the Appellant wrote back to HMRC, referring to an appeal by Rank Group plc and asking for their claim to be stood behind that appeal. HMRC did not respond to this letter, and claim not to have received it (though we find that they did).

8. On 15 October 2009, following the decision of the High Court in *Rank Group plc v HMRC* [2009] STC 2304, the Appellant wrote to HMRC again, referring to its letter dated 5 February 2007 and asking for its original claim now to be reconsidered in the light of the *Rank* decision.

9. On 24 November 2009 HMRC replied to the Appellant by email. At that time, HMRC were taking the view that all income from gaming machines was taxable, and they therefore formally rejected the Appellant's voluntary disclosure once again. They did not question the Appellant's reference to its earlier letter dated 5 February 2007, hence we accept that letter was sent as claimed by the Appellant and received by HMRC.

10. In HMRC's email dated 24 November 2009 (which was sent to the email address given at the foot of the Appellant's earlier letter dated 15 October 2009),

HMRC gave specific details of the Appellant's rights of review or appeal if it wished to contest HMRC's decision, as follows:

> "If you do not agree with my decision, you can
>
> - ask for my decision to be reviewed by an HMRC officer not previously involved with the matter, or
>
> - appeal to an independent tribunal
>
> If you opt for a review you can still appeal to the tribunal after the review has finished.
>
> If you want a review you should write to me at the above address within 30 days of the date of this letter, giving your reasons why you do not agree with my decision.
>
> If you want to appeal to the tribunal you should send them your appeal within 30 days of the date of this letter."

11. Mr Tack inferred that this email had not been seen by the Appellant, though he had no express instructions on the point. In the absence of any evidence to the contrary, we find that it was duly received by the Appellant.

12. The next event took place on 7 July 2011, when accountants on behalf of the Appellant wrote to HMRC again, seeking an update on the progress in processing the Appellant's original claim. HMRC replied on 19 September 2011, confirming that the claim was rejected and once again offering the Appellant the opportunity of a formal review or an appeal, in either case requiring action within 30 days. The stated reason for rejection of the claim was that it was not received until 11 July 2011, and was therefore out of time (this made no reference to the much earlier correspondence).

13. On 27 October 2011 the Appellant's accountants wrote again to HMRC, sending copies of the past correspondence and asking HMRC to confirm that the claim was stood over for local reconsideration pending the outcome of *Rank*.

14. On 25 November 2011 (incorrectly dated 25 October 2011 in the case of the letter to the Appellant), HMRC wrote again to the accountants and to the Appellant, re-iterating their rejection of the claim and confirming that the Appellant could apply for a review or make a direct appeal to the Tribunal, in either case within 30 days of the HMRC letter.

15. Notwithstanding this letter, the Appellant did not request a formal review nor did it submit notice of appeal to the Tribunal until 5 March 2012. Mr Tack was not able to give any reason for this final period of delay, merely observing that it was not a delay of such a length as should "knock out" the Appellant's claim.

Legislation, submissions and caselaw

Legislation

16. The discretion the Tribunal is asked to exercise is that contained in section 83G Value Added Tax Act 1994 ("VATA94"), which provides, so far as relevant, as follows:

> "(1) An appeal under section 83 is to be made to the tribunal before –
>
> (a) the end of the period of 30 days beginning with –
>
> (i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates…..
>
> ….
>
> (6) An appeal may be made after the end of the period specified in subsection (1)…. if the tribunal gives permission to do so."

17. The Tribunal therefore has a broad discretion so far as the legislation is concerned, and the key question is what criteria should be applied in exercising that discretion.

Submissions and caselaw raised at the hearing

18. At the hearing, Mr Tack referred the Tribunal to *Former North Wiltshire District Council v HMRC* [2010] UKFTT 449 (TC), where the Tribunal was considering applications for permission to appeal out of time in a VAT matter where the appeals were respectively almost 14 and 21 months out of time. After balancing, on the one hand, the Tribunal's assessment of the appellant's culpability in delaying appealing and the prejudice to HMRC in terms of the public interest in good administration and legal certainty and, on the other hand, the loss and injury that would be suffered by the appellant if an extension of time was refused, the Tribunal held that in the exceptional circumstances of the case permission ought to be granted.

19. The general point that came out of *North Wiltshire* which was agreed on by both parties at the hearing (but see below) was that the Tribunal should not reach a decision by reference specifically to the list of factors set out at CPR 3.9(1). Mr Tack referred to the following factors which he submitted should be taken into account in the Tribunal's balancing exercise when balancing the potential prejudice to the Appellant against its culpability in delaying the appeal and HMRC's prejudice:

> (1) Fault. He submitted the Appellant was not at fault, specifically in the light of its request to HMRC to hold matters in abeyance pending *Rank* in its 5 February 2007 letter (which was raising a different basis for the appeal compared to the *Linneweber* basis on which HMRC had by then rejected it). He invited us to accept (which we do) that HMRC received that letter, and said that

in the light of it, the subsequent delay should not be laid at the Appellant's door. In respect of the period up to November 2009, we agree with him.

(2) Good administration/finality. We accept that this is not an issue up to November 2009. Mr Tack effectively submitted that as *Rank* was (and remains) an ongoing issue generally, this appeal is only a very small part of a much larger picture of uncertainty for HMRC and as such the issue of uncertainty/finality should not carry much weight in the balancing exercise.

20. Mr Tack observed that the likelihood of success was also a factor that was considered in *North Wiltshire*. In the present case, he said the ECJ decision in *Rank* gave no particular help as it covered mechanised bingo but not the machines the subject of this appeal. There was therefore no particularly strong indication either way as to the likelihood of success in this appeal.

21. Mrs Ratnett said the Appellant had effectively had three warnings of the need to appeal promptly, the first of them in January 2007 and the last of them in November 2011. She cited *Eltham Hill Golf Club and Institute v HMRC* [2012] UKFTT (487) (TC) (in which the period of delay was over 4 years) and *Bathgate Leisure Limited v HMRC* [2012] UKFTT (637) (TC) (in which the period of delay was some three years eleven months. She did not take us to any particular passages in those decisions, relying more on the similarity between the periods of delay in those cases and the period that she considered to be the culpable period in this case.

The Data Select case

22. At the hearing, neither party referred to the decision of the Upper Tribunal in *Data Select Limited v HMRC* [2012] STC 2195 and the Tribunal, having referred the parties to that case, gave them the opportunity of making further written submissions following the hearing.

23. The principles that should govern the Tribunal's exercise of this discretion were considered at some length by the Upper Tribunal in *Data Select*. It was said that:

> "As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation of the delay? (4) what will be the consequences for the parties of an extension of time? And (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.
>
> ….
>
> In my judgment, the approach of considering the overriding objective [in Civil Procedure Rule 1.1] and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA."

24. Rule 1.1 of the Civil Procedure Rules lays down the "overriding objective of enabling the court to deal with cases justly and at proportionate cost". Until 1 April 2013 (i.e. at the time the Upper Tribunal was considering it for the purposes of *Data Select*), Rule 3.9 provided, so far as relevant, as follows:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including–
>
> (a) the interests of the administration of justice;
>
> (b) whether the application for relief has been made promptly;
>
> (c) whether the failure to comply was intentional;
>
> (d) whether there is a good explanation for the failure;
>
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
>
> (f) whether the failure to comply was caused by the party or his legal representative;
>
> (g) whether the trial date or the likely trial date can still be met if relief is granted;
>
> (h) the effect which the failure to comply had on each party; and
>
> (i) the effect which the granting of relief would have on each party."

25. Since 1 April 2013, Rule 3.9 has been radically shortened, so that it now provides as follows:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

26. For the purposes of the present application, we consider the guidance of the Upper Tribunal in *Data Select* should be read as referring to the original version of rule 3.9 and should not now be modified to refer to the new version.

Post-hearing submissions

27. In his further submissions, Mr Tack argued that the Appellant's application for an extension of time did not "offend the factors listed in CPR 3.9(1)". He observed

that "all that was said and done on 30 November *[at the hearing]* effectively included and satisfied the factors in CPR 3.9(1)". He then went on to link his previous submissions to particular paragraphs of CPR 3.9(1) and make some supplemental points.

28. He submitted that the Appellant's letter dated 5 February 2007 represented effectively a new basis for its claim, namely a claim under *Rank* rather than under *Linneweber* that had been rejected by HMRC in their letter dated 30 January 2007. Thus no appealable decision was at that stage extant. And when HMRC failed (in his submission) to reply to the Appellant's letter dated 15 October 2009, that state of affairs continued. He submitted that under section 98 VATA 94, HMRC were required to communicate with the Appellant by post, thus there was no basis on which HMRC's email of 24 November 2009 should be treated as a valid decision. So far as the 25 November 2011 decision was concerned, it was clearly wrong, therefore defective and effectively should be seen as HMRC letting down the Appellant in terms of the administration of justice.

29. He also submitted that the delay between HMRC's final decision and the notification of the appeal to the Tribunal should be seen in the context of a decision which he submitted was defective. This weighed in favour of the Appellant when considering the length of the delay. Given that, in his submission, the Appellant was "trying to enforce its claim", the fact and length of the delay should not be held against it, nor should the delay be considered as intentional.

30. He pointed out that the effect of refusing permission would be to shut out the Appellant, a "smallish business", from a potential refund of £154,000 of VAT plus interest. For HMRC there was no significant prejudice in the delay because the correspondence since 2007 made it clear that the Appellant was pursuing a claim based on *Rank*.

31. Mrs Ratnett did not have significant further submissions to make, beyond agreeing that it was appropriate to consider the matters listed in CPR 3.9(1), but that her earlier submissions effectively did so. She maintained HMRC's basic position that this application concerned a claim that had effectively been rejected by HMRC in January 2007. However many different ways that claim was justified, her central point appeared to be that it was essentially the same claim throughout and therefore the Appellant should have acted as soon as it was originally rejected to take advantage of its rights of appeal.

Discussion and decision

32. We should first mention that, in line with the recently published decision of the Upper Tribunal in *O'Flaherty v HMRC* [2013] UKUT 0161 (TCC), there is no limitation on extensions of time to "exceptional" cases. Each case must be considered on its own merits in line with the judicial guidance summarised in *Data Select*. Having said that, we also consider that it is for the Appellant to show that the time limit should be extended. As was confirmed in *O'Flaherty*, "it should be the exception rather than the rule that extensions of time are granted".

33. Addressing the specific questions raised in *Data Select*, we consider first that the purpose of the time limit is to bring finality and certainty to disputes between HMRC and taxpayers so that both are able to "close their books" on a dispute and move on to other matters.

34. Second, in the present case, we consider the question of the "length of the delay" must be considered broadly in the overall context of the history of the matter. We do not consider this is a case where we are simply looking at either (a) a delay from 30 January 2007 when HMRC issued their original rejection of the claim, or (b) a delay from 25 November 2011 when HMRC issued the last rejection. What we have are a series of repeated rejections, of which the final decision issued on 25 November 2011 is only the most recent.

35. Having considered the history of the correspondence between HMRC and the Appellant, it is obvious that there was a degree of misunderstanding. However, the bare fact remains that the Appellant was informed three times (30 January 2007, 24 November 2009, and 25 November 2011) that it should take specific action if it wished to appeal – on the latter two occasions identifying quite specifically what the Appellant needed to do and by when – and it failed to do so until March 2012. Even if the first of HMRC's rejections was insufficient, the second clearly was and once the Appellant was offered a third opportunity it should have gratefully seized it without delay, not taken the view that a further delay of several months would be acceptable. It is against that background that we assess the length of the delay.

36. In answer to the question of whether there was a good explanation for the delay, whilst that might have been the case in the early period after January 2007, we do not consider there was a good explanation for the Appellant's repeated disregarding of the specific statements that were made concerning the time limits. HMRC were seeking to bring finality and it seems to us that they did everything they could to that end, only to be repeatedly ignored by the Appellant.

37. The consequences of the delay for the Appellant are significant, in that it is shut out from pursuing a claim for £154,000 plus interest which, we are prepared to assume for present purposes, has a strong prospect of success. For HMRC the consequences are that they cannot close their books on a long running appeal for an amount which, though not small, is hardly significant in the overall context of the *Rank* litigation.

38. So far as the Appellant is concerned, however, it is difficult to square the importance which this appeal supposedly has for it with its cavalier disregard of clearly stated time limits.

39. In short, the cumulative failures of the Appellant promptly to exercise the rights of review or appeal offered to it leave the strong impression that it has little or no regard for time limits, even after repeated very clear warnings. This is not a simple case of one misunderstanding giving rise to a delay; the Appellant has failed to take the appropriate course of action which has been very clearly signposted to it on at least two occasions, and now seeks to avoid the consequences of that failure.

40. We consider that the Appellant has not shown proper attention to its own affairs and whatever the strength of its case (which is unknown until the *Rank* decision has been fully worked through in the UK judicial system, but we are prepared to assume it is strong), we do not feel the interests of justice militate in favour of us granting permission to appeal out of time, given the particular history of this claim.

41. The application for permission to appeal out of time is therefore refused.

42. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 24 May 2013